

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

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Protests of	)	
	)	Docket No. 08-ODRA-00459
Hi-Tec Systems, Inc.	)	Docket No. 08-ODRA-00460
	)	(CONSOLIDATED)
Pursuant to Solicitations DTFAWA-08-R-55501)		
and DTFAWA-08-R-55502)		

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**DECISION ON PROTESTER’S MOTION TO COMPEL**

This matter arises from a Motion to Compel Discovery (“Motion to Compel”) related to two pre-award bid protests (“Protests”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on August 25, 2008 by Hi-Tec Systems, Inc. (“Hi-Tec”). The Protests, which involve identical challenges to the terms of two solicitations (“Solicitations”), assert that the procurements at issue were required to be set aside for small business. *See* Protests at 1. The remedy requested by the Protester is for the FAA Program Office to amend the Solicitations to have the procurements set aside for small business; or, alternatively, to amend the Solicitations “to establish a category of the multiple awards to be set aside for small business.” *See* Protests at 4. For the reasons discussed herein, the ODRA denies the Motion.

**I. Factual Background**

By letter of September 19, 2008 (“September 19 Letter”), Hi-Tec transmitted a discovery request (“Discovery Request”) to the Program Office, with a copy to the ODRA, asserting: “Because the protests are based upon the failure of the FAA to comply with its own statutes and policies, extensive discovery will be required in order to ascertain the extent of the noncompliance.” *See* September 19 Letter. The Discovery Request identifies nineteen separate areas of information and documentation, requesting among

other things, (1) the identification of “all individuals” involved in a broad range of acquisition activities relating to Solicitation Nos. DTFAWA-080R-55501, DTFAWA-080R-55502, and DTFAWA-080R-55503<sup>1</sup>; and (2) all documents related thereto. *See* Discovery Request, Request Nos. 1-19. Upon receipt of a copy of Hi-Tec’s Discovery Request, the ODRA, by letter of September 24, 2008, directed the parties to confer and attempt to reach agreement on the Discovery Request in accordance with the ODRA’s normal procedures. The ODRA further noted that the ODRA Rules authorize the exchange of documents as part of limited, focused discovery, but do not contemplate interrogatories. *See* 14 C.F.R. § 17.37(f).

By letter of October 1, 2008 (“October 1 Letter”), Hi-Tec’s counsel purported to narrow the scope of the Discovery Request. The October 1 Letter explained, “Numbers 1-16 and 19 simply requested FAA organization chart(s) and identification of all individuals and copies of all documentation that were involved in any way or generated by anyone with regard to the procurement.” The October 1 Letter further explained that Request “Number 18 was a request for all documents involving the Administrator on a very narrow topic” and included slightly revised request numbers 16 and 17.<sup>2</sup>

The Program Office filed its Agency Response (“Agency Response”) in the form of a Motion to Dismiss the Protests on October 6, 2008. The Agency Response included an

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<sup>1</sup> While the first two Solicitations are at issue in these Protests, the third Solicitation, identified as No. DTWA- 08- R-55503, has not been protested.

<sup>2</sup> The revised request numbers read as follows:

16. For all contracts as defined below which have been awarded to the Air Traffic Organization by any FAA contracting officer that are currently open or that have been completed within the past one year, provide the following information: Contract Number, Contracting Officer, Organization which issued the contract, date of the contract award, anticipated duration of the contract, and anticipated total cost of the contract. Those contracts and task orders include but are not limited to the contracts/task orders and the Screening Information Requests that resulted in the award of the following original contracts and the task orders/DORFOS; DTFACT-04-DS0007/0001, DTFACT-03-D-00037/0001, DTFACT-03-D-00037/0001, DTFACT-03-D-00037/0003, DTFACT-03-D-00037/0004, DTFACT-03-D-00022/0002, DTFACT-03-D-00022/0003, and DTFACT-03-D-00006/0001.

17. Provide a copy of all congressional testimony that addressed FAA policy with regard to small business since April 1, 1996.

exhibit binder of relevant documents and set forth the Program Office's legal position. By letter of October 7, 2008 ("October 7 Letter"), Hi-Tec requested that the ODRA order the Program Office to provide it with a complete response to its Discovery Request, noting that, in Hi-Tec's view, the Agency Response only provided a partial response to seven of its requests and a "total lack of response" to twelve of its requests. In response, the ODRA advised the parties that it would treat the October 7 Letter as the equivalent of a motion to compel discovery. *See* ODRA Letter dated October 8, 2008. Hi-Tec subsequently filed a pleading with the ODRA styled as a "First Supplemental Motion to Compell [sic] Discovery" on October 9, 2008 for the purpose of providing "additional information and argument." Motion to Compel at 1. Hi-Tec's Motion to Compel identifies each request contained in its September 19 Letter, and asserts that each requires a response from the Program Office. *Id.* at 2.

On October 14, 2008, the Program Office filed an Opposition to Hi-Tec's Motion to Compel ("Opposition"). In the Opposition, the Program Office asserts that it provided documents relevant to the issues in dispute to Hi-Tec as part of its Agency Response. The Opposition also objects to all 19 of the Discovery Requests as overly broad, unduly burdensome and irrelevant. *See* Opposition at 2-10.

## **II. Discussion**

### **A. The Scope of Bid Protest Discovery**

The ODRA Procedural Rules contemplate limited, focused discovery in bid protests because, by their nature, Protests involve relatively short timeframes from filing to decision when compared to contract disputes. More specifically, the conduct and scope of discovery in ODRA protest proceedings are defined in the ODRA Procedural Regulations at 14 C.F.R. §17.37, entitled "Default adjudicative process for protests." That Section provides at subsection (f):

The parties may engage in voluntary discovery with one another ... so as to obtain information relevant to the allegations of the protest. The DRO

... may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents. Where justified, the DRO ... may direct the taking of deposition testimony, however, the FAA dispute resolution process does not contemplate extensive discovery. The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery, which are consistent with time frames established in this part and with the FAA policy of providing fair and expeditious dispute resolution.

14 C.F.R. §17.37(f) does not contemplate the use of interrogatories in protests, but, rather, primarily relies on the production of documents as part of “limited focused discovery”. *Protest of MAXIMUS, Inc.*, 04-TSA-009 (Decision Denying Motion for Reconsideration, dated November 29, 2004). In this regard, the ODRA’s bid protest discovery rules are similar those of the Government Accountability Office, and are much narrower than the nature and scope of discovery contemplated by the Federal Rules of Civil Procedure. *See, e.g.*, FRCP Rule 26(b)(1); 4 C.F.R. § 21.3(d); *The Boeing Company*, B- 311344, June 18, 2008.

Further, the ODRA adjudicates bid protests pursuant to 49 U.S.C. § 40110(d)(4), which among other things, provides authority to conduct proceedings under the Administrative Procedure Act, 5 U.S.C.A. §§ 551 *et seq.* (“APA”). Generally, under the APA, the review of protested agency action is based on “the material that was developed and considered by the agency in making its decision.” *Aero Corporation v. United States*, 38 Fed. Cl. 408, 410 (1997), *citing Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The focus of review “should be the administrative record already in existence, not some new record made initially by the reviewing court.” *Id.* at 411. Thus, the nature of the inquiry is limited generally to “materials that were before the agency when it made its decision.” *Id. quoting Applications, Inc. v. United States*, 37 Fed. Cl. 345, 349-50 (1997) (internal citations omitted).

Evidence beyond the “administrative record” may be considered only in exceptional circumstances. *Id.* In this regard, limited deposition testimony from contracting officials may be allowed in bid protests where such testimony is required to explain the challenged

actions. *Id.* Inquiry into the mental processes of administrative decision makers is generally improper. *Id. citing United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941). In line with these authorities, the ODRA Procedural Regulation at 14 C.F.R. §17.37 expressly contemplates the possibility of limited depositions where justified by circumstances of a particular protest.

## B. The Hi-Tec Interrogatories

Most of the Hi-Tec Discovery Request involves interrogatories. The Discovery Request asks that the Program Office identify items of information rather than produce existing documents considered by contracting officials in making the set aside decision challenged in these Protests. For example, request numbers 2 through 11 seek the identification of “all individuals” who were involved in various aspects of the procurement. Discovery Request at 1-3. Request number 16 seeks the following information for all contracts “awarded by any FAA contracting officer that are currently open or have been completed within the past two (2) years”: contract number, contracting officer, organization which issued the contract, date of the contract award, anticipated duration of the contract and anticipated total cost of the contract. *Id.* at 3. Moreover, the Protester’s Discovery Request contains various definitions of the term “identify” when it refers to persons and documents, as well as events, meetings, incidents, conversations or occurrences, which is consistent with the practice of propounding interrogatories. *Id.* at 4-5.<sup>3</sup>

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<sup>3</sup> In this regard, the Discovery Request defines the term “identify” when used in reference to a person to mean: “to state his or her full name, present or last known position and business affiliation; and last known business and personal telephone number.” *Id.* at 4. The Discovery Request defines the term “identify” when used in reference to a document to mean: “to state the date of preparation, author, title (if any), subject matter, number of pages and type of document or if the document cannot be identified in this manner, state some other means of distinguishing the document; state the present location of the document; state the name, address and telephone number of each person who has the original or a copy of the document. Similarly, when used to refer to an event, meeting, incident, conversation or occurrence, the September 19, 2008 Letter defines the term “identify” to mean: “to state its date, place and details including the complete substance of any conversation; identification of all participants therein and witnesses thereto and identify all documents reporting or otherwise referring to its details.” *Id.* at 5.

For the reasons discussed above, the ODRA concludes that, to the extent that Protester's Discovery Request seeks information in the form of interrogatories, it exceeds the scope of permissible discovery contemplated by the ODRA Rules for bid protests. The ODRA, therefore will not order the Program Office to respond to the interrogatories set forth in Discovery Request numbers 2 through 11.

C. The Hi-Tec Document Requests

The document requests set forth in Discovery Requests 1 and 12 through 19 ("Document Requests") are inconsistent with the permissible scope of discovery set forth in the ODRA Procedural Regulations. Rather than requesting documents in a limited manner focused on the pending protest issue, as prescribed by 14 C.F.R. §17.37(f), Hi-Tec's Document Requests seek broad categories of documents in what amounts to an unduly burdensome "fishing expedition." *Protest of MAXIMUS, Inc, supra.*

Hi-Tec attempts to justify the broad scope of its document requests on the basis that only such a production will allow it to analyze whether a "multitude of organizations" accurately made decisions and complied with FAA statutes, policies and guidance, relative to contract bundling and small business set asides. Motion to Compel at 2-4. For example, with respect to Request Number 13 through 15 and 19, the Protester argues:

It is a request for all of the files maintained by the government as well as all documents, notes, memoranda, etc. prepared by all federal and contractor employees and consultants who were involved in any way in the ATO-T procurement that has resulted in the three SIRs. Without a review of all of this information, there is no way of determining the accuracy of the various determinations and decisions.

*Id.* at 2. Additionally, in support of request number 17 for all letters to members of Congress and all Congressional testimony relative to FAA treatment of small business, which is set forth in F.N. 2 above, the Protester states:

To what extent did the government appreciate the extent of its statutory responsibility? Testimony may indicate that the Government did not understand that all opportunities that are reasonable must be made

available to small business which testimony would support the allegation that the Government is not in compliance with Section 438 [of P.L. 104-50].

*Id.* at 3.

The ODRA finds Hi-Tec's Document Requests to be overly broad and unduly burdensome. The sole issue to be determined by the ODRA in these Protests is whether the Program Office's decision not to set aside the protested procurements for small business had a rational basis, was arbitrary or capricious, or constituted an abuse of discretion. *Protest of Kinematica, Inc.*, 05-ODRA-00361. The Agency Response contains, among other things, declarations of the individuals responsible for making the challenged decisions. The Agency Response also contains the documents on which these individuals relied in making the challenged decisions, as well as pertinent solicitation documents issued by the Program Office prior to the filing date of the Protests. Furthermore, the documents already provided to Hi-Tec and to the ODRA are consistent with the requirements of the ODRA Procedural Regulations, and provide a meaningful opportunity for review by the ODRA of the protested decisions. *Aero Corporation, supra.*

### **III. Conclusion**

The ODRA finds that Hi-Tec's Discovery Request: seeks a form of discovery, i.e., interrogatories, not contemplated by the ODRA Procedural Regulations for Protests; is overly broad and unduly burdensome; and goes far beyond the scope of permissible bid protest discovery. *Aero Corporation, supra*, at 410-411. For these reasons, the Protester's Motion to Compel is denied in its entirety. \*

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\* This Decision is in the nature of an interlocutory order. It will become final upon issuance of the final Agency Order at the conclusion of these Protests.

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Marie A. Collins  
Dispute Resolution Officer  
FAA Office of Dispute Resolution for Acquisition  
October 29, 2008